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Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article

By JAMES K. GAYNOR*

MOST of the articles of the Uniform Code of Military Justice can be explained to a soldier or a sailor in relatively simple terms without undue difficulty.¹ Article 134, however, is so broad in scope that a proper explanation would require, in effect, an explanation of hundreds of judicial decisions. The reason? This article, commonly called the general article, denounces substantially three broad offenses. It provides:

Though not specifically mentioned in this chapter, [1] all disorders and neglects to the prejudice of good order and discipline in the armed forces [2] all conduct of a nature to bring discredit upon the armed forces, and [3] crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.²

This language covers more than seventy rather diverse offenses.

The United States Supreme Court has said that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.³

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1. UNIFORM CODE OF MILITARY JUSTICE art. 137 [hereinafter cited as UCMJ], 10 U.S.C. § 937 (1964) provides that each enlisted member of the military service shall have explained to him, within 6 days after he enters upon active duty, various specified articles pertaining to the administration of justice in the military service plus all of the punitive articles. This explanation must be repeated after 6 months, and again upon each reenlistment. These requirements are unique to the military service. Persons in all other ways of life are presumed to know both the state and federal laws which govern their conduct without any requirement that those laws be explained to him.

2. UCMJ art. 134, 10 U.S.C. § 934 (1964).

3. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

Yet the validity of article 134 and its predecessors has been sustained in enough cases that any further attack on it would seem futile.⁴ Similar provisions have been in existence since the beginning of the Republic and even before; but they received very little critical attention in the law journals—at least until the past two decades. Some of the writers who have discussed article 134 have been severe.⁵ One of them termed it a study in vagueness;⁶ another called it elemental confusion.⁷ None have attempted to place the general article within its proper perspective.

I. Historical Development

Almost two thousand years ago a law of Arrius Meander in the Roman *Digest*⁸ provided that: "Every disorder to the prejudice of general discipline is a military offense, such as, for instance, the offense of laziness, or insolence, or idleness." The Articles of War of Gustavus Adolphus of Sweden, issued in 1621, made punishable whatever was not contained therein but was repugnant to military discipline.⁹ The British Articles of War of 1765 made punishable crimes not capital and those disorders or neglects to the prejudice of good order and military discipline that were not mentioned in the other articles.¹⁰

The American Articles of War dated 1775 adopted the British provision with only a minor change in wording.¹¹ Substantially the same language was used by the Congress in 1806¹² and in the revision of 1874.¹³ A subsequent revision added "all conduct of a nature to bring discredit upon the military service."¹⁴ Since that addition in 1916,

4. All pertinent cases are discussed in Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

5. Note, *Constitutional Law—Uniform Code of Military Justice—General Article Void for Vagueness?*, 34 NEB. L. REV. 518 (1955); Nichols, *The Devil's Article*, 22 MILITARY L. REV. 111 (1963). An excellent analysis of the article is in an editorial note, Peltzer, *The Military Crime of Prejudicial Conduct: An Appraisal of United States v. Messenger*, 22 GEO. WASH. L. REV. 76 (1953).

6. Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N. CAR. L. REV. 142 (1959).

7. Hagan, *The General Article—Elemental Confusion*, 10 MILITARY L. REV. 60 (1960).

8. DIGEST, XLIX, § 16, at 6.

9. W. WINTHROP, MILITARY LAW AND PRECEDENTS 914 (War Dep't reprint, 1920) [hereinafter cited as WINTHROP].

10. *Id.* at 946.

11. *Id.* at 957. Only one word was changed in the corresponding provision of the Articles of War adopted by the Continental Congress on Sept. 20, 1776. *Id.* at 971.

12. Act of Apr. 10, 1806, ch. 20, 2 Stat. 371.

13. The old provision was renumbered as article 62. Rev. Stat. § 1342 (1874).

14. Act of Aug. 29, 1916, ch. 418, § 3, art. 96, 39 Stat. 666. It was said in the Manual for Courts-Martial, U.S. Army, ¶ 446 (1917) that the principal reason for

article 134 has remained substantially unchanged.

The original Articles of War constituted the disciplinary code of the Army—and later of the Air Force when it became a separate service in 1947. The Articles for the Government of the Navy had a similar provision: "All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct."¹⁵ With the adoption of the Uniform Code of Military Justice in 1951, both articles were brought together to form the present article 134. Thus, in its present form the article consists of three parts: (1) conduct prejudicial to good order and discipline, (2) conduct that would discredit the armed services, and (3) crimes and offenses not capital.

II. Crimes and Offenses Not Capital

The third clause of article 134 may be considered entirely apart from the first two clauses. Although it may not be readily apparent from its wording, the clause has a definite meaning and is wholly independent from "prejudice to good order and discipline" or "discredit to the service."

"Crimes and offenses not capital" is defined in the *Manual for Courts-Martial* as describing those acts or omissions, not otherwise punished by the Uniform Code, that are denounced as crimes or offenses by enactments of the Congress, or under the authority of the Congress, and are triable in federal courts.¹⁶ Capital offenses are those

including this phrase was to make military offenses of activities of retired soldiers which might bring discredit upon the service, such as the nonpayment of debts, but with "a limited field for the application of this part of the general article to soldiers on the active list."

15. Articles for the Government of the Navy, ch. 10, § 1624, art. 22, 18 Rev. Stat. pt. 1, at 280 (1874), redesignated article 22(a) after a provision relating to fraudulent enlistment was later added. Act of Mar. 3, 1893, ch. 212, 27 Stat. 716. The general article of the Navy was article XXXII in the 1800 enactment, Act of Apr. 23, 1800, ch. 33, art. XXXII, 2 Stat. 49 and article 8 in the 1862 revision, Act of July 17, 1862, ch. 204, art. 8, 12 Stat. 603. The latter included the wording "but in no case shall punishment by flogging be inflicted, nor shall any court-martial adjudge punishment by flogging."

16. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* ¶ 213(e) (1969) [hereinafter cited as 1969 *MANUAL*]. Winthrop said that crimes not capital were triable by court-martial only if the conduct was to the prejudice of good order and military discipline. *WINTHROP, supra* note 9, at 723-24. This view appears to have prevailed until the revisions of the Articles of War in 1916.

Although the criminal provisions of federal law generally are in title 18 of the United States Code, it was pointed out in Hall, *Courts-Martial Jurisdiction over Title 18 U.S. Code and Other Federal Offenses*, (Jan.-Feb. 1961) JAG J. (Navy) 3, that federal crimes are defined in at least thirteen other titles. *E.g.*, 26 U.S.C. § 7234 (1964), relating to the sale of improperly packaged butter.

for which a death sentence is authorized, even though not mandatory; thus, it is improper to charge an offense as a violation of article 134 if the specification alleges facts which constitute a capital offense.¹⁷ However, a violation of article 134 may be found as a lesser included offense in a charge that alleges a capital offense. For example, in a charge of murder, the lesser included offense of negligent homicide may be properly punished as a violation of the general article.¹⁸

A violation of state law is not an offense within the meaning of the third clause (unless it also violates the Assimilative Crimes Act),¹⁹ and neither is a violation of foreign law.²⁰ Of course, a violation of a state or foreign law may be an offense under the first or second clause if the conduct is either "prejudicial to good order and discipline" or "of a nature to bring discredit upon the service."²¹

The Assimilative Crimes Act provides that in those geographic areas in the United States over which the federal government has exclusive jurisdiction, the criminal law of the state in which the area is located becomes the federal law.²² The act does not apply if the offense is within the scope of some other criminal enactment of the Congress,²³

17. *United States v. French*, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959); *Rhodes*, 28 C.M.R. 427, *aff'd*, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960); WINTHROP, *supra* note 9, at 721-22.

18. *United States v. Benavides*, 2 U.S.C.M.A. 226, 8 C.M.R. 26 (1953).

19. 18 U.S.C. § 13 (1964).

20. 1969 MANUAL ¶ 213(c); *Hughes*, 7 C.M.R. 803 (1953). However, in *United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313 (1957), a conviction of, *inter alia*, evading Japanese customs requirements was sustained although the court did not discuss this offense.

21. See *United States v. Grosso*, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957); *Grose*, 26 C.M.R. 740 (1958); *Peterson*, 16 C.M.R. 565, *petition denied*, 4 U.S.C.M.A. 740, 16 C.M.R. 292 (1954); *Freeman*, 15 C.M.R. 639, *petition denied*, 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954); *Wolverton*, 10 C.M.R. 641 (1953); *Fox*, 6 C.M.R. 533 (1952). See also Hagan, *The General Article—Elemental Confusion*, 10 MILITARY L. REV. 60 (1960). This author suggests at 104-05 that proof of the existence of a local statute may be of some value in showing the attitude of the local populace toward the commission of acts denounced as criminal. In *United States v. Leach*, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956), it was said that reference to a state statute is surplusage. In *Deese*, 3 C.M.R. (A.F.) 307 (1951) (ACM 2693), it was said that whether a violation of foreign law constitutes conduct of a nature to bring discredit upon the service is to be determined by American standards rather than those of the place of the conduct. *Accord*, *Parkman*, 4 C.M.R. (A.F.) 270 (1951) (ACM 3008). See note 52 *infra*.

22. 18 U.S.C. § 13 (1964). See generally *United States v. Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962); *Waller*, *The Assimilative Crimes Act*, 2 MILITARY L. REV. 107 (1958).

23. *Dunaway v. United States*, 170 F.2d 11 (10th Cir. 1948). Although the court specifically avoided the issue, it was intimated in *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944), that the act is inapplicable where state law is inconsistent with valid Army regulations. In *Fox*, 6 C.M.R. 533 (1952), an accused was convicted

and of course it does not apply in a trial by a court-martial if the conduct is otherwise a violation of military law. In addition to including all elements of the state enactment, a specification relying on the act must allege that it is applicable.²⁴ And logically, it has been held that the punishment for a conviction by court-martial cannot exceed that authorized by the state law for a violation of its statute.²⁵

A specification alleging a crime or offense not capital must include all of the elements of the federal statute violated,²⁶ but it need not identify the statute unless doing so would be necessary to properly understand the charge.²⁷ Since a specification under article 134 need not specify which of the three clauses was violated,²⁸ an attempt to allege a crime or offense not capital may be sustained in an appropriate case as a violation of the first or second clause.²⁹ Likewise, a court-martial may find an accused guilty of a crime or offense not capital by substitution when the specification alleges a violation of some article of the Uniform Code other than the general article.³⁰

The punishment for a conviction under the third clause is limited to that provided by the federal statute violated or to that of a similar article in the Uniform Code. If conduct violates a specific article of the Uniform Code, punishment for that conduct cannot be increased by ignoring the specific article and charging it as a crime or offense not capital under the general article.³¹

In past years, the number of convictions under the general article for crimes or offenses not capital has been relatively small compared to

of usury in violation of a Texas statute but the conviction was set aside, the Board of Review holding that the act was inapplicable because the Texas law was a civil remedial statute rather than a criminal enactment.

24. *Morris*, 21 C.M.R. 477, *petition denied*, 7 U.S.C.M.A. 780, 22 C.M.R. 331 (1956).

25. *United States v. Picotte*, 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961).

26. *United States v. Herndon*, 1 U.S.C.M.A. 461, 4 C.M.R. 53 (1952).

27. *United States v. Hogsett*, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958); *Harbaugh*, 28 C.M.R. 711 (1959). In *United States v. Dicario*, 8 U.S.C.M.A. 353, 24 C.M.R. 163 (1957), the court said that failure to allege a mail-theft case as a violation of the Federal Criminal Code indicated an intention to charge the military version of the offense which is "distinct" from the federal statute.

28. *United States v. Marker*, 1 U.S.C.M.A. 393, 3 C.M.R. 127 (1952).

29. *United States v. Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952); *United States v. Herndon*, 1 U.S.C.M.A. 461, 4 C.M.R. 53 (1952).

30. *Rivers*, 3 C.M.R. 564 (1951).

31. *United States v. DeAngelo*, 15 U.S.C.M.A. 423, 35 C.M.R. 395 (1965); *United States v. White*, 12 U.S.C.M.A. 599, 31 C.M.R. 185 (1962); *United States v. Middleton*, 12 U.S.C.M.A. 54, 30 C.M.R. 54 (1960); *United States v. Cramer*, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957).

the number of convictions under the first or second clause. Since it was held in 1969 that a court-martial does not have jurisdiction of an act of misconduct not directly connected with military duty in peacetime,³² it would appear that allegations under the third clause will be even more limited, if not virtually eliminated in future times of peace.

III. The Breadth of Prejudicial or Discreditable Conduct

Conduct that violates the first or second clause of article 134 is either prejudicial to good order and discipline, or is of a nature to bring discredit upon the armed forces. As noted before in connection with the third clause, the specification need not state which of these clauses allegedly has been violated.³³ The instructions to the court-martial may be properly phrased in the alternative; that is, they may state that: "Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces *or* it was of a nature to bring discredit upon the armed forces."³⁴

It has long been recognized that an irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as prejudicing discipline in at least some indirect or remote sense, but the article has not been used to cover such distant effects. Its scope has been limited to cases in which the prejudice was reasonably direct and palpable.³⁵

Article 134 is not intended to set up a moral standard for the military. An individual's private activities are considered outside the scope of article 134 as long as the conduct does not interfere with the per-

32. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

33. *United States v. Marker*, 1 U.S.C.M.A. 393, 3 C.M.R. 127 (1952). See note 25 & accompanying text *supra*.

34. In *United States v. Darby*, 9 U.S.C.M.A. 416, 26 C.M.R. 196 (1958), convictions were set aside for failure to instruct that prejudice to discipline or discredit to the service was an element of the offense. *Accord*, *United States v. Lawrence*, 8 U.S.C.M.A. 732, 25 C.M.R. 236 (1958); *United States v. Gittens*, 8 U.S.C.M.A. 673, 25 C.M.R. 177 (1958); *United States v. Williams*, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957). *But cf.* *United States v. Grimes*, 9 U.S.C.M.A. 272, 26 C.M.R. 52 (1958), where the accused entered a plea of guilty to assault and battery in a charge of assault with intent to commit rape, it was held that it was not necessary to instruct that prejudice to discipline or discredit to the service was an element where the defense counsel assented to instructions without this element.

35. *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964); 1969 MANUAL ¶ 213(b); Manual for Courts-Martial, *United States* ¶ 213a (1951); Manual for Courts-Martial, U.S. Army ¶ 183a (1949); Manual for Courts-Martial, U.S. Army ¶ 152a (1928).

formance of military duties. And generally, the conduct must involve persons other than the accused³⁶ to constitute an offense.³⁷

The purpose of the first clause of article 134 is to preserve discipline; the purpose of the second clause is to maintain a good reputation for the military services.³⁸ Conduct which violates the second clause must be *of a nature* to bring discredit upon the Armed Forces. Thus an offense may be committed even though *actual* discredit to the service is not shown.³⁹ The criteria for identifying conduct that is of a nature to bring discredit upon the Armed Forces are undefined; however, the courts-martial apparently are able to apply the criteria successfully on an ad hoc basis. It has been said that the place of the conduct is immaterial and that it may be committed in a private, civilian residence,⁴⁰ but in view of *O'Callahan*⁴¹ this would probably be true only in time of war.

IV. The Table of Maximum Punishments

The text of the *Manual for Courts-Martial*, the administrative regulations governing military discipline,⁴² discusses only fourteen types of offenses which violate article 134.⁴³ More than forty others are listed in the Table of Maximum Punishments,⁴⁴ a table promulgated by the President pursuant to article 56 of the Uniform Code.⁴⁵ The table is a listing of maximum punishments for violations of the general article, specific articles, and lesser included offenses. Of course, such a

36. *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

37. In *United States v. Kirchner*, 1 U.S.C.M.A. 477, 478, 4 C.M.R. 69, 70 (1952), the court said that article 134 "must be interpreted in the light of existing customs and usages."

38. 1969 MANUAL ¶ 213(c). In *United States v. Cummins*, 9 U.S.C.M.A. 669, 26 C.M.R. 449 (1958), it was held that a conviction of dishonorable failure to pay a debt cannot be sustained where the creditor has testified that he was satisfied with the conduct of the debtor.

39. *United States v. Blue*, 10 U.S.C.M.A. 67, 27 C.M.R. 141 (1958); *United States v. Thompson*, 3 U.S.C.M.A. 620, 14 C.M.R. 38 (1954); cf. *United States v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956).

40. *United States v. Lowe*, 4 U.S.C.M.A. 654, 16 C.M.R. 228 (1954). The court said the gravamen of the offense "is not the locus as such, but the discrediting circumstances." *Id.* at 658, 16 C.M.R. at 228.

41. *O'Callahan v. Parker*, 395 U.S. 258 (1969). Drug offenses are still considered service-related.

42. Exec. Order No. 11476, 34 Fed. Reg. 12937 (1969).

43. 1969 MANUAL ¶ 213(f) (1969).

44. *Id.* ¶ 127(c). The Table of Maximum Punishments was first adopted in 1891. Previously, examples of conduct which resulted in convictions under the general article had been given by Colonel William Winthrop in his great work, *Military Law and Precedents*, the last edition of which was published in 1896. It still is considered by many to be the greatest work on military law which has ever been produced.

45. UCMJ art. 56, 10 U.S.C. § 856 (1964).

listing is not exclusive; an act need not be listed in the table to be an offense under the general article.⁴⁶

As early as 1896 Winthrop listed more than a hundred different types of conduct which had resulted in convictions under the general article.⁴⁷ Some of the more unusual were: (1) being offensively unclean in person, (2) lawless conduct by a soldier resulting in his civilian conviction and confinement which deprived the Government of a considerable portion of his enlisted service, (3) a noncommissioned officer engaging in a public sparring exhibition in a saloon, (4) introduction of liquor into the Indian country, and (5) joining and parading with an association of Fenians who were reported to be in armed hostility to a nation at peace with the United States.⁴⁸

The Table of Maximum Punishments was first authorized during Winthrop's time by the Act of September 27, 1890.⁴⁹ Of course many of the offenses under the general article later became the subjects of specific articles, such as assault, insubordination, and unauthorized absence from duty. Drunkenness was limited, at least in the original table, to those who had been convicted of committing such offense within 10 miles of station by a civilian court.

Additions to the offenses listed in the table under the general article were made in 1905 and again in 1910, but they were of minor consequence. The table was completely revised in 1917 to list forty-nine types of conduct as violations of the general article. By 1928 the number was reduced to thirty-seven due to amending legislation which had made some types of conduct, such as sodomy and abandoning guard, a violation of other specific articles. Additional changes were made in 1949 and again in 1951. The table included in the current *Manual for Courts-Martial*, effective in 1969, deleted more than a half-dozen offenses under the general article while nine were added and the wording of several others was changed.⁵⁰ Notwithstanding the additions and deletions to the table of the types of conduct that violate the general article, there are still many offenses not listed that are punishable under article 134.

46. In *United States v. Holt*, 7 U.S.C.M.A. 617, 621, 23 C.M.R. 81, 85 (1957), the court said that the list in the table is "illustrative" rather than restrictive. See text accompanying note 180 *infra*.

47. WINTHROP, *supra* note 9, at 730 n.75 (1st ed. printed 1896).

48. *Id.* at 726-32.

49. Act of Sept. 27, 1890, ch. 998, 26 Stat. 491.

50. Offenses under the general article are listed alphabetically in the table, thus the first offense listed is abusing a public animal. No reported case of a conviction of

The elements of each of the offenses listed in the table are found by referring to an appendix of the *Manual for Courts-Martial* which gives the recommended wording of specifications or allegations.⁵¹ The appendix, however, does not adequately explain the meaning of discreditable or prejudicial conduct under the general article. An explanation of such conduct can only be obtained by referring to the decided cases.⁵² In order to show the scope of the general article this writer has grouped those cases providing significant military precedent into seven convenient categories. In all the cases the conduct charged was held to have violated article 134.

V. The Scope of the General Article

The seven categories into which cases brought under the general article fall are: (1) assault and battery, (2) conduct of an indecent nature, (3) illicit sexual relations, (4) dishonorable conduct, (5) various forms of fraud, (6) drunkenness and disorderly conduct, and (7) all other offenses. The seventh group includes negligent homicide, fleeing the scene of an accident, disloyal statements, unlawful entry, offenses involving the mail, impersonation, communicating a threat, improper discharge of firearms, and such minor acts as committing a nuisance and appearing in an unclean uniform.

A. Assault under the General Article

The first seven words of article 134 are words of limitation.⁵³ Conduct cannot be punished as a violation of the general article if it is a

this particular offense has been found in the present century, but Winthrop cited fifteen such convictions between 1865 and 1893. WINTHROP, *supra* note 9, at 726-32.

51. 1969 MANUAL app. 6(c).

52. Since the United States Court of Military Appeals was established in 1951 as the supreme court of the military judicial system, it has published more than eighteen volumes of its decisions. These, and the decisions of the Courts of Military Review—the intermediate appellate body in the court-martial system which was known as the Board of Review prior to the 1968 amendments to the Uniform Code—are reported in a series entitled *Court-Martial Reports*, averaging about two volumes a year since the Uniform Code became effective.

Before then, the Army published *Digests of Opinions of the Judge Advocate General*—volumes were issued in 1912 and in 1940—and opinions of Army Boards of Review, eighty-one volumes between 1929 and 1949, forty-nine for overseas areas during World War II, and eleven volumes which included opinions of the Judicial Council from 1949 until the Uniform Code became effective. The Navy published *Court-Martial Orders*, which discussed the important features of selected cases, and the Air Force, during its short existence before the Uniform Code became effective, published four volumes of *Court-Martial Reports*. These volumes are cited C.M.R. (A.F.) to distinguish them from the current series of Court-Martial Reports.

53. See *United States v. Hallett*, 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954).

violation of some other article.⁵⁴ (Military law has been consistent in this respect since the time of Winthrop.)⁵⁵ But this then raises an initial question about the case of an assault which may be a violation of article 128.⁵⁶ Simple assault under article 128 is punished by maximum confinement and forfeiture of pay for 3 months, but there are nine types of aggravation listed in the table under this article.⁵⁷ Commission of the most serious, the intentional infliction of grievous bodily harm, is subject to a maximum punishment of dishonorable discharge and confinement for 5 years.

The court was more severe in the case of assault upon a commissioned officer not in the execution of his office. It reasoned that a greater punishment than that provided for simple assault was permitted prior to enactment of the Uniform Code, and that there was no indication that Congress intended to change the situation so that article 128 would preempt such assault offenses.⁵⁸

Later, the court sustained a conviction under the general article of assault upon a person in the execution of police duties.⁵⁹ In this case, the court held that the Uniform Code empowers the President to prescribe maximum limits of punishment; he may, therefore, properly provide greater punishment for misconduct aggravated by special circumstances, whether the allegation is under article 128 or the general article.⁶⁰

Most of the assault offenses, including assault consummated by a battery on a child under 16 years of age, are now listed in the table under article 128, yet there remain four assault offenses listed under the general article. One of these, assault with intent to commit murder or rape, is subject to a maximum punishment of dishonorable discharge and confinement for 20 years. Perhaps these assault offenses should more properly have been listed under article 128 in the latest revision of the code.

54. Convictions under article 134 were sustained as violative of other punitive articles in *United States v. Thorpe*, 9 U.S.C.M.A. 705, 26 C.M.R. 485 (1958) (false official statement under article 107), and *United States v. O'Neil*, 3 U.S.C.M.A. 416, 12 C.M.R. 172 (1953) (desertion under article 85).

55. *WINTHROP*, *supra* note 9, at 725, *quoted with approval in* *Carter v. McClaghry*, 183 U.S. 365, 397 (1902).

56. 10 U.S.C. § 928 (1964).

57. 1969 MANUAL ¶ 213(f)(1).

58. *United States v. Toutges*, 13 U.S.C.M.A. 425, 32 C.M.R. 425 (1963).

59. UCMJ art. 56, 10 U.S.C. § 856 (1964).

60. *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963).

B. Indecent Conduct

Five types of indecent conduct are listed as a violation of the general article: (1) indecent acts with a child under 16 years, (2) indecent exposure, (3) indecent language communicated to a female over 16 years of age, (4) indecent language communicated to any child under 16 years of age, and (5) indecent acts with another.⁶¹ These offenses are quite serious. A dishonorable discharge is authorized for any of these offenses except the second, indecent exposure; furthermore, as much as 7 years of confinement may be adjudged for the first, indecent acts with a child under 16 years of age.

These offenses are *malum in se*, and instead of including them under article 134, they should be specifically denounced. One wonders why such conduct must be "prejudicial to good order and military discipline" or "of a nature to bring discredit upon the service."

In the case of an indecent act with a child under 16 years of age, the act must be done "with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both."⁶² It may involve, for example, a verbal communication accompanied by gestures,⁶³ or merely the use of indecent language.⁶⁴ The conduct, however, must be in the actual presence of the victim; consequently, communicating indecent language by telephone will not suffice.⁶⁵ This distinction seems to be unnecessarily subtle.

Indecent exposure is the intentional exposure of the body in a place open to public view in a manner calculated to shock feelings of chastity or to corrupt morals. Since wrongful intent is an element, the offense is not committed if the exposure is by negligence or accident.⁶⁶ In one

61. 1969 MANUAL, app. 6(c), A6-23.

62. *Id.* ¶ 213(f)(3); *accord*, United States v. Nastro, 7 U.S.C.M.A. 373, 22 C.M.R. 163 (1956). In United States v. Sakaye, 11 U.S.C.M.A. 680, 29 C.M.R. 496 (1960), it was said that this intent may be inherent in the act of a male who fondles a female victim and places his hands upon her body. In United States v. Singletary, 14 U.S.C.M.A. 146, 33 C.M.R. 358 (1963), the accused said he inserted his finger into the private parts of a female child with whom he was babysitting to determine the extent of injuries she received from a fall. The court said that this would constitute a defense if believed by the court-martial.

63. *E.g.*, Daniel, 26 C.M.R. 894, *petition denied*, 10 U.S.C.M.A. 666, 27 C.M.R. 512 (1958); Johnson, 35 C.M.R. 587, *petition denied*, 15 U.S.C.M.A. 685, 35 C.M.R. 478 (1965) (the indecency consisted of holding a child and attempting to kiss her).

64. *E.g.*, Childers, 31 C.M.R. 747, *petition denied*, 13 U.S.C.M.A. 686, 32 C.M.R. 472 (1962); Riffe, 25 C.M.R. 650, *petition denied*, 9 U.S.C.M.A. 813, 25 C.M.R. 486 (1957).

65. United States v. Knowles, 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965).

66. United States v. Conrad, 15 U.S.C.M.A. 439, 35 C.M.R. 411 (1965); United States v. Manos, 8 U.S.C.M.A. 734, 25 C.M.R. 238 (1958).

case a conviction was sustained where the exposure occurred in an automobile capable of being seen by the public, even though the automobile was parked in a secluded place.⁶⁷

In the communication of indecent language, the test is whether the language "is calculated to corrupt morals or excite libidinous thoughts" rather than whether the words used are obscene.⁶⁸ The intent to arouse passions or sexual desires is not necessary to constitute the offense of an indecent act with another.⁶⁹ An "indecent" act is required, but in this connection "indecent" means indecency as the term ordinarily is used. Thus, the offense was not committed by two men sleeping in the same bed while clad in their underwear when no other evidence of indecency was present.⁷⁰ Actual touching is not necessary, thus a conviction was sustained where one male made indecent movements in regard to his person toward another.⁷¹

The five types of indecent conduct listed in the table and discussed above are not exclusive. Convictions have been sustained under the general article for association with known sexual deviates,⁷² and for voyeurism, commonly known as window peeping;⁷³ but it was held that the mere possession of obscene pictures did not violate the general article.⁷⁴

C. Illicit Sexual Relations

Among the sex offenses listed in the table under the general article are adultery, bigamy, pandering, and wrongful cohabitation.⁷⁵ Adultery is defined in military law as "sexual intercourse between a man and

67. Fletcher, 23 C.M.R. 911 (1956).

68. Choleva, 33 C.M.R. 599 (1963); Beauregard, 31 C.M.R. 680, *petition denied*, 12 U.S.C.M.A. 767, 31 C.M.R. 314 (1962); Simmons, 27 C.M.R. 654, *petition denied*, 10 U.S.C.M.A. 679, 27 C.M.R. 512 (1959). As to evidence obtained from telephone monitoring, see United States v. Gopaulsingh, 5 U.S.C.M.A. 772, 19 C.M.R. 68 (1955).

69. United States v. Nastro, 7 U.S.C.M.A. 373, 22 C.M.R. 163 (1956).

70. Bradford, 16 B.R. (Army) 317 (C.M. 228799) (1943); *accord*, Munson 17 B.R. (Army) 139 (1943) (C.M. 229412). In Moore, 33 C.M.R. 667 (1963), a finding that an accused committed an indecent act by attempting to mark upon the exposed buttocks of another person who was being forcibly restrained was held to constitute no more than an assault.

71. United States v. Johnson, 7 U.S.C.M.A. 499, 22 C.M.R. 289 (1957).

72. United States v. Hooper, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

73. Clark, 22 C.M.R. 888, *petition denied*, 7 U.S.C.M.A. 790, 22 C.M.R. 331 (1956). In Manos, 24 C.M.R. 626, *rev'd on other grounds*, 8 U.S.C.M.A. 734, 25 C.M.R. 238 1957, a conviction of window peeping was sustained even though there was no evidence that anyone was in the room or that the accused saw anything.

74. Schneider, 27 C.M.R. 566 (1958).

75. 1969 MANUAL app. 6(c), art. 134.

woman, one of whom is lawfully married to a third person."⁷⁶ In one case a conviction of adultery was set aside because the necessary discreditable circumstances were not shown by the evidence.⁷⁷ In this connection it should be noted that the husband-wife privilege as a rule of evidence applies where adultery is charged.⁷⁸

Bigamy, as in civilian jurisdictions, is entering into a marriage while validly married to another.⁷⁹ It has been held that belief in the dissolution of a prior marriage is a defense if the belief is honest and reasonable.⁸⁰

Pandering is arranging for a female to have sexual intercourse with another or to engage in prostitution for money.⁸¹ One case states that the offense does not require the expectation of financial gain.⁸²

The offense of wrongful cohabitation is committed when a man and a woman live together, ostensibly in wedlock when, in fact, no such marriage exists.⁸³ In contrast to adultery, it is not necessary that either of the parties be married to anyone or that there be evidence of sexual intercourse.⁸⁴ The offense involves a course of conduct rather than a sojourn for a single night.⁸⁵

Fornication, defined as sexual intercourse "involving mutual con-

76. Neville, 7 C.M.R. 180, 190, *petition denied*, 2 U.S.C.M.A. 670, 7 C.M.R. 84 (1952).

77. Walters, 11 C.M.R. 355, *modified*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954).

78. United States v. Rener, 17 U.S.C.M.A. 65, 37 C.M.R. 329 (1967).

79. Guidry, 22 C.M.R. 615 (1956); Graves, 5 C.M.R. 582 (1952). In United States v. Patrick, 2 U.S.C.M.A. 189, 7 C.M.R. 65 (1953), the court discussed the presumptions of innocence and validity of the second marriage as opposed to the presumption of continued life of the first spouse and concluded that a question of fact, uncomplicated by presumptions, resulted.

80. United States v. Pruitt, 17 U.S.C.M.A. 438, 38 C.M.R. 236 (1968); United States v. Bateman, 8 U.S.C.M.A. 88, 23 C.M.R. 312 (1957); United States v. McCluskey, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955). In United States v. Bradshaw, 15 U.S.C.M.A. 146, 35 C.M.R. 118 (1964), it was said that annulment of a bigamous marriage is not of itself a defense but is relevant to the issue of mistake.

81. United States v. Gentry, 8 U.S.C.M.A. 14, 23 C.M.R. 238 (1957) (merely transporting others to a house of prostitution does not constitute pandering); *cf.* United States v. Brown, 8 U.S.C.M.A. 255, 24 C.M.R. 65 (1957); United States v. Snyder, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

82. Bohannon, 20 C.M.R. 870 (1955).

83. Grimstad, 35 B.R. (Army) 341 (1944) (C.M. 254122). In United States v. Leach, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956), it was said (with Quinn, C.J., dissenting) that it is not necessary to prove that the relationship was a matter of common knowledge. As to the inference relating to marriage from cohabitation, see United States v. Smith, 14 U.S.C.M.A. 405, 34 C.M.R. 185 (1964).

84. United States v. Melville, 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958).

85. Moody, 12 B.R. (Army) 119 (1942) (C.M. 218647).

sent by both parties" when neither of the parties is married,⁸⁶ is a military offense only when the circumstances are of a nature to bring discredit upon the service.⁸⁷ Such a showing may not be as difficult as it might seem. When two soldiers had sexual intercourse with two females in the presence of each other, each couple witnessed the act of the other. This was held to be discreditable conduct.⁸⁸

D. Dishonorable Conduct

There are two types of conduct listed in the table under article 134 which are denominated as "dishonorable": (1) making and uttering a worthless check by dishonorably failing to maintain sufficient funds for its payment, and (2) dishonorably failing to pay a just debt.⁸⁹ Most offenses involving worthless checks violate article 123a, an offense added to the Uniform Code in 1961.⁹⁰ The conduct that violates the general article is limited to a failure to maintain sufficient funds for payment of a check when such conduct amounts to gross indifference or bad faith;⁹¹ more than simple negligence must be involved.⁹² Thus, a conviction could not be sustained where there was an honest belief that funds would be on deposit at the time of presentment, and the belief continued until presentment and dishonor even though the belief was not reasonable.⁹³

The dishonorable failure to pay a just debt is an offense which has no counterpart in the civilian community. It has been said that the American concept of justice "has excluded the abhorrent practice of imprisonment for debt. . . ."⁹⁴ Yet the Court of Military Appeals has sustained convictions of this traditional military offense. In one case,

86. Mosby, 23 C.M.R. 425, 430-31 (1957).

87. In *United States v. Snyder*, 1 U.S.C.M.A. 423, 427, 4 C.M.R. 15, 19 (1952), the court indicated that fornication may be a military offense "if committed under such conditions of publicity or scandal as to enter that area of conduct given over to the police responsibility of the military establishment." *Accord*, *Burns*, 25 C.M.R. 791, *petition denied*, *United States v. Harrington*, 9 U.S.C.M.A. 812, 25 C.M.R. 486 (1958).

88. *United States v. Berry*, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956).

89. 1969 MANUAL, app. 6(c) A6-21.

90. 10 U.S.C. § 923a (1964).

91. *United States v. Downard*, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955); *accord*, *United States v. Stratton*, 11 U.S.C.M.A. 152, 28 C.M.R. 376 (1960).

92. *United States v. Bullock*, 12 U.S.C.M.A. 142, 30 C.M.R. 142 (1961).

93. *United States v. Remele*, 13 U.S.C.M.A. 617, 33 C.M.R. 149 (1963). In *United States v. Richardson*, 15 U.S.C.M.A. 400, 35 C.M.R. 372 (1965), the fact that the accused relied upon deposits of checks received for gambling debts, which checks were dishonored, did not result in dishonorable conduct.

94. *United States v. Kirksey*, 6 U.S.C.M.A. 556, 559, 20 C.M.R. 272, 275 (1955).

after observing that a civil suit is the remedy for debt in the civilian community, the court said that such suits are seldom effective against military personnel because of their transient nature:

Moreover, members of the military community—easily identifiable through the wearing of the uniform—are inevitably grouped in the public mind as a class—with the result that a failure by one to discharge monetary responsibilities tends to brand all not only as criminal persons, but as poor credit risks as well, in the eyes of the civilian population.⁹⁵

Like the bad check offenses, more than negligence must be involved for the failure to pay a just debt to constitute an offense.⁹⁶ There is no offense as long as there is a *bona fide* dispute as to the existence of the debt.⁹⁷ One cannot be convicted if he in fact is unable to pay a debt and there was no wrongful intent in incurring it.⁹⁸ Of course, since the requirement is that there must be discredit to the military service, an offense is not committed simply because the debtor in a private commercial transaction is discredited in the eyes of the creditor and his agents.⁹⁹ Something more is required. Thus, in *Alexander*¹⁰⁰ the court found that:

There is proof that the accused borrowed the money and failed to pay, but there is no suggestion that he deceived the bank in getting them to make the loan. He was not dealing with a child or an inexperienced person or one lacking business acumen and discretion.

95. *Id.* As to debts of military personnel see Murphy, *The Soldier's Right to a Private Life*, 24 MILITARY L. REV. 97, 111 (1964); Anderson, *Indebtedness and Financial Discipline*, USAF JAG BULL., July 1960, at 31.

96. *United States v. Swanson*, 9 U.S.C.M.A. 711, 26 C.M.R. 491 (1958) (dictum). In *United States v. Cummins*, 9 U.S.C.M.A. 669, 26 C.M.R. 449 (1958), it was said that failure to make any payment over a long period of time may tend to show dishonorable conduct, but delay alone will not establish the offense.

97. 1969 MANUAL ¶ 213(f)(7). In *United States v. Webb*, 10 U.S.C.M.A. 422, 27 C.M.R. 496 (1959), it was said that the accused's assertion that he "was upset" when he signed an acknowledgment of indebtedness was not sufficient to make the debt a disputed one so as to avoid prosecution. In *Arndt*, 7 B.R.-J.C. (Army) 229 (1950) (C.M. 341921) it was said that there may be a conviction even though the facts are in dispute, distinguishing such a dispute from a disputed debt.

98. *United States v. Schneiderman*, 12 U.S.C.M.A. 494, 31 C.M.R. 80 (1961); *White*, 25 C.M.R. 733 (1958). Convictions were set aside in *United States v. Cummins*, 9 U.S.C.M.A. 669, 26 C.M.R. 449 (1958) (manager of the creditor loan firm testified that the accused's account was classified as satisfactory despite late payments); *Young*, 12 C.M.R. 939, *petition denied*, 4 U.S.C.M.A. 721, 15 C.M.R. 431 (1954) (an airman earning \$60 per month was three months delinquent in paying installments on a \$180 note); *Lamburth*, 4 C.M.R. (A.F.) 737 (1951) (A.C.M. 3985) (an officer was three and a half months delinquent in a grocery bill of \$25.40); *London*, 8 B.R.-J.C. (Army) 57 (1950) (C.M. 342392) (involved a debt to a small-loan company at a high rate of interest where the creditor took no steps to collect by civil process).

99. *White*, 25 C.M.R. 733 (1958).

100. *Alexander*, 22 C.M.R. 740 (1956).

A commercial bank is fully competent to protect itself in making loans. It dealt with the accused at arm's length. When it extended credit to him, it assumed a known business risk. When the accused failed to pay, it had a legal note to sue on, and indeed did sue him civilly.¹⁰¹

The court observed that "it is not a crime to be sued" and that remaining in default for several months is not dishonorable unless the facts "clearly show deliberate bad faith" reflecting wrongful intent.¹⁰²

E. Various Forms of Fraud

One of the various forms of fraud that violates the general article is bribery, the offer or gift of something valuable to a person for the purpose of influencing his official duties.¹⁰³ Graft, the use of one's official position to obtain something of value, also violates the general article.¹⁰⁴ In either offense, the recipient must be a person in a position that would apparently permit him to be influenced improperly, although he may be unable to perform the act for which the payment is offered or given.¹⁰⁵ An offer does not constitute bribery unless it is in terms that can actually be accepted. Thus, a person who asked at the time of his apprehension how much it would take to forget the matter was not guilty of bribery.¹⁰⁶

Soliciting and accepting funds from military subordinates is graft.¹⁰⁷ One case even held that borrowing from a military subordinate is an offense. This was in spite of the fact that the loan would have been made despite the superior position of the borrower.¹⁰⁸

Acceptance of gifts by one acting for the government, even though freely given, may constitute graft. Where one defendant accepted gifts of considerable value but asserted that they were not in return for any specific consideration or favor, the Court of Military Appeals said it "is naive in the extreme" to believe that gifts or favors of such nature may be accepted "without kindling at least a spark of hope in the heart

101. *Id.* at 743.

102. *Id.*

103. Graalum, 19 C.M.R. 667, *petition denied*, 6 U.S.C.M.A. 813, 19 C.M.R. 413 (1955).

104. *United States v. Cash*, 14 U.S.C.M.A. 96, 33 C.M.R. 308 (1963); *United States v. Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953). The former involved acceptance of money by a finance clerk for making an advance payment, and the latter involved acceptance of money for transporting a passenger in a government vehicle. These are typical of the many convictions of graft which have been sustained.

105. *Williams*, 23 C.M.R. 868 (1957).

106. *United States v. Morrison*, 10 U.S.C.M.A. 525, 28 C.M.R. 91 (1959).

107. *United States v. Wiley*, 16 U.S.C.M.A. 449, 37 C.M.R. 69 (1966).

108. *Mayne*, 39 C.M.R. 628 (1968).

of the giver." The public "regards the acceptance of gratuities by its servants with grave suspicion;" thus, such activities must inevitably bring discredit upon the military service.¹⁰⁹ In another case where the gifts were of very small value and were accepted according to a Korean custom, it was held that no offense was committed.¹¹⁰

Other forms of fraud include the signing of a false record and the making of a false statement; both are covered under article 107. Forgery is a violation of article 123, and the making of a false claim, along with other types of fraud, violates article 132. But offenses relating to false passes or other military documents, and altering public records, are listed as violations of article 134. These rather serious offenses under the general article¹¹¹ differ from forgery in that the latter is committed only if the document has the apparent capability of operating to the prejudice of another.¹¹²

In spite of the range of analogous offenses under articles 107, 123, and 132, much has remained within the purview of article 134. Thus, convictions under the general article were sustained in the following cases: the improper use of another's identification card,¹¹³ the wrongful possession of incomplete pass forms that could easily be completed,¹¹⁴ and the possession of a false pass with knowledge of its falsity.¹¹⁵ Other convictions were sustained where the documents in question were: a pass that was ambiguous because it showed the same date for arrival and departure,¹¹⁶ an identification card with an altered birth date,¹¹⁷ a false vehicle-clearance form,¹¹⁸ a false ration book,¹¹⁹ and a leave form containing an unauthorized insertion that permitted the use of civilian clothing.¹²⁰ On the other hand, convictions were set aside in

109. *United States v. Marker*, 1 U.S.C.M.A. 393, 398, 3 C.M.R. 127, 132 (1952).

110. *Lowry*, 8 C.M.R. 344, *petition denied*, 2 U.S.C.M.A. 679, 8 C.M.R. 178 (1953).

111. If an intent to deceive is established, 3 years confinement at hard labor are authorized. See *United States v. Blue*, 3 U.S.C.M.A. 550, 13 C.M.R. 106 (1953); *United States v. Karl*, 3 U.S.C.M.A. 427, 12 C.M.R. 183 (1953).

112. In *Davis*, 31 C.M.R. 469 (1961), *rev'd on other grounds*, 13 U.S.C.M.A. 125, 32 C.M.R. 125 (1962), the article 134 offense was distinguished from the offense violative of 18 U.S.C. § 701 (1964).

113. *Chism*, 31 C.M.R. 421 (1961).

114. *Holmes*, 18 C.M.R. 599 (1955).

115. *United States v. Burton*, 13 U.S.C.M.A. 645, 33 C.M.R. 177 (1963).

116. *Collier*, 23 C.M.R. 560, *petition denied*, 8 U.S.C.M.A. 770, 24 C.M.R. 311 (1957).

117. *Nugent*, 33 C.M.R. 664 (1963).

118. *Tomes*, 9 C.M.R. 679 (1953).

119. *United States v. Tamas*, 6 U.S.C.M.A. 502, 20 C.M.R. 218 (1955).

120. *United States v. Showalter*, 15 U.S.C.M.A. 410, 35 C.M.R. 382 (1965).

the following cases: possession of an unsigned furlough certificate,¹²¹ possession of a pass after the accused had reported it lost and had obtained another,¹²² and possession of genuine orders for an allegedly wrongful purpose.¹²³

The alteration of a military pay record¹²⁴ or of an application for Army Emergency Relief has been held to be the alteration of public records, and thus a violation of article 134.¹²⁵ An altered sick slip was held not to be a public record, however, since it was only for the information of the commanding officer, not the public at large.¹²⁶

F. Drunkenness and Disorderly Conduct

Various circumstances under which a person is considered drunk or disorderly are listed in the Table of Maximum Punishments under article 134. All are subject to relatively minor punishment.

The military services long have considered drunkenness as "any intoxication that is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties, whether caused by liquor or drugs."¹²⁷ In approving this definition, the Court of Military Appeals said: If the accused's conduct is not such as to create the impression within the minds of observers that he is unable "to act like a normal rational person," there can be no sensible impairment of his faculties. If, because of intoxicating liquors, there was a perceptible lessening of accused's ability to act like a normal rational person, then it may be said that accused's faculties were sensibly impaired.¹²⁸

Drinking liquor with a prisoner is listed in the table as a violation of the general article; and in this case, it need not be to the extent of causing intoxication. In one of the few reported cases, the accused was convicted of drinking with a prisoner of war.¹²⁹

To violate article 134, disorderly conduct must be something less than riot or breach of the peace, offenses which are violations of arti-

121. Harmon, 40 B.R. (Army) 45 (1944) (C.M. 260877).

122. Kayes, 11 C.M.R. 878 (1953).

123. Hunter, 8 C.M.R. 770 (1953).

124. Owens, 25 C.M.R. 596 (1958).

125. Houle, 15 C.M.R. 521, *petition withdrawn*, 4 U.S.C.M.A. 748, 17 C.M.R. 381 (1954).

126. Young, 21 C.M.R. 431 (1956).

127. 1969 MANUAL ¶ 191; Manual for Courts-Martial, United States ¶ 191 (1951); Manual for Courts-Martial, U.S. Army ¶ 173 (1949); Manual for Courts-Martial, U.S. Army ¶ 145 (1928); Manual for Courts-Martial, U.S. Army ¶ 435 (1917).

128. United States v. Bull, 3 U.S.C.M.A. 635, 638, 14 C.M.R. 53, 56 (1954); *accord*, United States v. Straub, 12 U.S.C.M.A. 156, 30 C.M.R. 156 (1961).

129. Houck, 31 B.R. (Army) 61 (1944) (C.M. 247878).

cle 116. Some of the various descriptions of "disorderly" have referred to it as conduct which tends to disturb the public peace and decorum, to scandalize the community, or to shock the public sense of morality;¹³⁰ or as conduct which is of such a nature as to affect the peace and quiet of persons who may witness it and be disturbed or provoked to resentment by it;¹³¹ or conduct constituting an unaggravated type of breach of the peace, such as shouting or making loud noises during the hours normally reserved for rest by the more conservative elements of society.¹³² Examples include the use of obscene language in a cafe,¹³³ kicking the door of a hotel room,¹³⁴ blowing an automobile horn on a military post late at night,¹³⁵ and improper remarks made by an officer to an enlisted man and his female companion.¹³⁶

The punishment for being disorderly under such circumstances as to bring discredit upon the military service is not limited to disturbances of a contentious nature. In the case of some conduct not listed in the Table of Maximum Punishments, it has been held that the punishment prescribed for being disorderly under discreditable circumstances was applicable. Such conduct has been referred to as a disorder, a general disorder, or more commonly, a simple disorder. Examples are possession of a false pass or ration book without proof of an intent to deceive,¹³⁷ and acceptance of money for the issuance of a pass where graft could not be established because the official position of the accused was not alleged.¹³⁸

G. Other Offenses Violative of the General Article

Negligent homicide, an unlawful killing resulting from simple negligence,¹³⁹ is generally not an offense in civilian jurisdictions except

130. McMillin, 22 B.R. (Army) 115 (1943) (C.M. 235557).

131. Powers, 5 C.M.R. 206 (1952), *citing* State v. Zanker, 179 Minn. 355, 229 N.W. 311 (1930); *accord*, McGlone, 18 C.M.R. 525 (1955).

132. Burrow, 26 C.M.R. 761 (1958).

133. Reid, 36 B.R. (Army) 391 (1944) (C.M. 257015).

134. Brennan, 24 B.R. (Army) 149 (1943) (C.M. 238048).

135. Bethard, 12 B.R. (Army) 67 (1941) (C.M. 218415).

136. Loney, 8 C.M.R. 533 (1952), *petition denied*, 2 U.S.C.M.A. 678, 8 C.M.R. 178 (1953). In Grubb, 20 B.R. (Army) 213 (1943) (C.M. 423008), it was said that abusive language is not a disorder if it results from unwarranted provocation.

137. United States v. Tamas, 6 U.S.C.M.A. 502, 20 C.M.R. 218 (1955); United States v. Blue, 3 U.S.C.M.A. 550, 13 C.M.R. 106 (1953). In Reid, 18 C.M.R. 341 (1955), it was held that wrongful use of another's gasoline credit card was not analogous to wrongful use of another's pass with intent to defraud but nevertheless was a disorder in violation of the general article.

138. Williams, 23 C.M.R. 868 (1957).

139. United States v. Russell, 3 U.S.C.M.A. 696, 14 C.M.R. 114 (1954). For a

those having automobile homicide statutes. In military law the offense includes, but is not limited to, homicide by a motor vehicle. It may also be committed by careless use of a weapon or other instrumentality.¹⁴⁰ Here, the requirement of simple negligence should not be confused with the more stringent culpable negligence required for involuntary manslaughter.

Fleeing from the scene of an accident is a rather common statutory offense in civilian jurisdictions. In military law it "has long been considered of a nature to bring discredit upon the Armed Forces."¹⁴¹ When a vehicle strikes a person or collides with another vehicle or anything else, the driver has a duty to stop immediately, make his identity known, and give assistance to anyone who is injured.¹⁴² The collision need not be with a moving vehicle; the duty is the same if a vehicle strikes a parked car.¹⁴³

Uttering disloyal statements that tend to undermine discipline and loyalty is conduct of a treasonable nature, although treason, as such, is not included in the Uniform Code as an offense. Proof that a disloyal statement was deposited in the mail and addressed to another is sufficient to establish that it was uttered,¹⁴⁴ and failure to accomplish the intended purpose is not a defense.¹⁴⁵ The conviction under article 134 of an enlisted man who said, "Captain, you're no damned good and the Coast Guard is no damned good," was set aside because, although it may have constituted disrespect (article 89), it was not a disloyal statement.¹⁴⁶

Housebreaking in violation of article 130 is an unauthorized breaking and entry into a building or structure with an intent to commit a criminal offense therein. Lacking such an intent, unlawful entry is a

general discussion, see Munster & Larkin, *Negligent Homicide in Military Law*, 46 CALIF. L. REV. 782 (1958); Stevens, *Manslaughter and Negligent Homicide*, USAF JAG J., Feb. 1957, at 15; 21 GEO. WASH. L. REV. 641 (1953).

140. *E.g.*, United States v. Kirchner, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952) (shooting at another with a pistol); Diaz, 12 C.M.R. 593 (1953) (firing a weapon while clearing it in an unsafe manner); Fletcher, 13 C.M.R. 165 (1953) (careless discharge of a firearm while hunting); White, 7 C.M.R. 448 (1953) (detonation of a grenade thought to have been inactivated).

141. United States v. Eagleson, 3 U.S.C.M.A. 685, 690, 14 C.M.R. 103, 108 (1954).

142. United States v. Russell, 3 U.S.C.M.A. 696, 14 C.M.R. 114 (1954).

143. Hicks, 13 B.R. (Army) 219 (1942) (C.M. 221686).

144. Wassner, 43 B.R. (Army) 189 (1945) (C.M. 266244).

145. McQuaid, 5 C.M.R. 525, *petition denied*, 2 U.S.C.M.A. 666, 5 C.M.R. 130 (1952).

146. Gustafson, 5 C.M.R. 360 (1952) (conviction of a separate charge of disrespect to an officer was sustained).

violation of the general article.¹⁴⁷ It is not necessary that there be a breaking, or that the place entered be a building or structure, as required in the offense of housebreaking.¹⁴⁸ A tent,¹⁴⁹ a barbed-wire enclosure,¹⁵⁰ and a railroad car¹⁵¹ are places subject to unlawful entry, but oddly enough an automobile¹⁵² or an aircraft¹⁵³ are not.

The wrongful possession of marijuana or habit-forming drugs apparently was not a problem in the military service prior to World War I, nor was it mentioned in the early editions of the *Manual for Courts-Martial*. However, on March 11, 1918, a general order issued by the War Department provided that possession "of any habit-forming drug not ordered by a medical officer of the Army" was prejudicial to discipline or discreditable conduct, and thus "possession" became a violation of the general article.¹⁵⁴ The offense does not include possession of instruments which may be used to administer habit-forming drugs,¹⁵⁵ but if a military commander issues an order prohibiting such possession, a failure to obey the order may violate article 92.¹⁵⁶

Perjury is a violation of article 131 but "statutory" perjury, subornation of perjury, and false swearing are listed as violative of article 134.

147. Williams, 4 C.M.R. 801 (1952); Washington, 3 C.M.R. 503 (1952).

148. See *United States v. Gillin*, 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958).

149. *United States v. Love*, 4 U.S.C.M.A. 260, 15 C.M.R. 260 (1954).

150. Esposito, 21 C.M.R. 406, *petition denied*, *United States v. Reil*, 7 U.S.C.M.A. 771, 22 C.M.R. 331 (1956).

151. *United States v. Hall*, 12 U.S.C.M.A. 374, 30 C.M.R. 374 (1961). In *Hollings*, 31 C.M.R. 358 (1961), it was said that the "Queen Bee Refreshment Center" described an enclosure which could be the subject of unlawful entry.

152. *United States v. Gillin*, 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958).

153. *United States v. Taylor*, 12 U.S.C.M.A. 44, 30 C.M.R. 44 (1960).

154. Gen. Order No. 25. Failure to pay a transfer tax in obtaining marijuana violates 26 U.S.C. § 4744(a) (1964). This provision was discussed in *United States v. Blair*, 10 U.S.C.M.A. 161, 27 C.M.R. 235 (1959). As to the illegal import of narcotics, see 21 U.S.C. § 174 (1964); as to the illegal export, see 21 U.S.C. § 182 (1964). The applicability to military personnel of the federal law which makes it illegal for a drug addict to leave the United States without registration is discussed in Cooper, *Does 18 U.S.C. 1407 Apply to Convictions by Courts-Martial for Narcotics Offenses?*, USAF JAG BULL., Nov. 1959, at 26. In *United States v. LeBlanc*, No. 22, 770 (U.S.C.M.A. April 17, 1970), the court held that a court-martial could not try smuggling of marijuana into the United States in violation of 21 U.S.C. § 176(a) (1964) because the prohibition "entails the exercise of governmental powers different from the regulation of the armed forces."

155. Lefort, 15 C.M.R. 596 (1954).

156. E.g., *United States v. Washington*, 9 U.S.C.M.A. 313, 26 C.M.R. 93 (1958); *United States v. Meadows*, 7 U.S.C.M.A. 52, 21 C.M.R. 178 (1956). In *United States v. West*, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964), a pharmacist took narcotics to his barracks and asserted it was for the purpose of safeguarding them. It was said that he may have been guilty of a violation of article 92 but not of article 134.

These violations of the general article are serious offenses and a punitive discharge is an authorized punishment. "Statutory" perjury refers to title 18 of the United States Code which defines perjury as a falsification under circumstances in which federal law authorizes that an oath be given.¹⁵⁷ Article 131 is much narrower as it is limited to falsification in a judicial proceeding or in the course of justice.

One who makes an oral or written statement under lawful oath, knowing the statement to be false, is guilty of false swearing.¹⁵⁸ False swearing may be, for example, a false sworn statement to an administrative board or investigator.¹⁵⁹

As in perjury, proof of two contradictory statements is insufficient to prove false swearing.¹⁶⁰ Further, like perjury, corroboration is required.¹⁶¹ The common law rule requires the testimony of two independent witnesses, but in military practice the testimony of one witness will suffice if it is supported by other evidence.¹⁶² An unintentional falsehood will not constitute the offense,¹⁶³ nor will a statement which is technically true, although misleading.¹⁶⁴ A falsification under oath will establish a *prima facie* cause, but since wrongful intent must be established, an effort in good faith to correct a false statement may show an absence of wrongful intent.¹⁶⁵

157. A criminal penalty is provided by 18 U.S.C. § 1621 (1964) for false testimony under oath "before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." A false statement in any matter within the jurisdiction of any department or agency, made knowingly, is made punishable by 18 U.S.C. § 1001 (1964). *E.g.*, Harbaugh, 28 C.M.R. 711 (1959) (false statement at a pretrial investigation).

158. 1969 MANUAL ¶ 213(f)(4). In *United States v. Smith*, 9 U.S.C.M.A. 236, 237, 26 C.M.R. 16, 17 (1958), the court discussed the difference between perjury and false swearing, and said that perjury "requires that the false statement be made in a judicial proceeding and be material to the issue, whereas these matters are not part of the offense of false swearing."

159. *United States v. Claypool*, 10 U.S.C.M.A. 302, 27 C.M.R. 376 (1959) (falsification to a military criminal investigator); *United States v. Gomes*, 3 U.S.C.M.A. 232, 11 C.M.R. 232 (1953) (falsification to an agent of the Federal Bureau of Investigation); Galloway, 8 C.M.R. 323 (1952), *aff'd*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1953) (falsification to an Inspector General). In *Cox*, 26 C.M.R. 582 (1958), it was held that the maximum is that provided for a violation of article 107 (false official statement).

160. Reed, 9 C.M.R. 163 (1953); Evans, 4 C.M.R. 369 (1952).

161. 1969 MANUAL ¶¶ 210, 213(f)(4).

162. *United States v. Walker*, 6 U.S.C.M.A. 158, 19 C.M.R. 284 (1955) (circumstantial evidence).

163. In *United States v. Doctor*, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956), the court said that the elements of false swearing, as in article 107 relating to false official statements, include knowledge of the falsity and an intent to deceive.

164. *United States v. Purgess*, 13 U.S.C.M.A. 565, 33 C.M.R. 97 (1963).

165. Parrish, 21 C.M.R. 639 (1955), *aff'd*, 7 U.S.C.M.A. 337, 22 C.M.R. 127 (1956).

Subornation of perjury is inducing another to commit perjury¹⁶⁶ and it has been held that there can be no conviction of subornation if the alleged perjurer is acquitted.¹⁶⁷ Among the related offenses which have resulted in convictions have been soliciting another to refuse to testify,¹⁶⁸ intimidating a witness,¹⁶⁹ assaulting a witness for having testified,¹⁷⁰ and telling another to remain quiet if questioned during an investigation.¹⁷¹

Escape from confinement is a violation of article 95, but escape from correctional custody, breach of correctional custody, violation of parole, and breaking restriction are listed in the Table of Maximum Punishments as violations of the general article. Escape from or breach of correctional custody¹⁷² has the same maximum authorized punishment as escape from confinement—1 year in confinement and a dishonorable discharge.

Violation of parole and breach of restriction are relatively minor offenses. A bad-conduct discharge and confinement for 6 months are authorized for the former, and confinement for 1 month for the latter. The term "parole" has been defined as an authorized offer of freedom from restraint under specified conditions and the acceptance of the offer by the person being freed from restraint.¹⁷³ A person cannot be placed on parole against his will. He must voluntarily accept the conditions of the parole,¹⁷⁴ and this can occur only upon a release from custody or confinement.¹⁷⁵ Restriction, on the other hand, is strictly a punitive measure; thus, a restriction to ensure an individual's presence

166. Procuring another to commit perjury is a violation of 18 U.S.C. § 1622 (1964). Threatening or endeavoring to influence, intimidate, or impede any witness in any court of the United States or any court officer, or injuring a person or his property for having attended or testified in a judicial proceeding, is a violation of 18 U.S.C. § 1503 (1964).

167. *United States v. Doughty*, 14 U.S.C.M.A. 540, 34 C.M.R. 320 (1964).

168. *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); *cf. Zimmek*, 23 C.M.R. 714 (1956) (solicitation to make a false official statement).

169. *Rossi*, 13 C.M.R. 896 (1953).

170. *United States v. Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952).

171. *McNeil*, 48 B.R. (Army) 287 (1945) (C.M. 276298).

172. The concept of correctional custody did not become a part of military law until the amendment of article 15. 76 Stat. 447 (1962). Under this legislation, a commander is authorized to place an enlisted person in custody for a maximum of 30 days without trial by court-martial and without the stigma of a conviction appearing on the individual's record.

173. *Aiken*, 16 C.M.R. 612 (1954); *Thompson*, 6 C.M.R. 573 (1952).

174. *Rigney*, 6 C.M.R. 736 (1952).

175. In *Pickle*, 30 C.M.R. 468 (1960), it was said that a conditional release from pretrial confinement constitutes a restriction rather than parole.

for duty is illegal.¹⁷⁶

A recent addition to the scope of article 134 is obstructing justice, an offense included in the table with the latest revision. Along with refusal to certify, obstructing justice is punished by confinement for up to 5 years. This penalty is considerably more serious than contempt of court, article 48, which may be punished by confinement for 30 days and a fine of \$100. A person cannot be required to testify if he invokes his privilege against self-incrimination provided by article 31, although he may be compelled to testify if the possibility of incrimination is precluded, *e.g.*, by a grant of immunity.¹⁷⁷

Misprision of felony is defined as concealing knowledge of the actual commission of a felony by another and failing to make the facts known to civil or military authorities.¹⁷⁸ Knowledge alone, however, is insufficient; there must be an affirmative act of concealment.¹⁷⁹ Concealment of a misdemeanor, however, is probably excluded.¹⁸⁰

Larceny is a violation of article 121, but receiving stolen property and obtaining services under false pretenses are listed under the general article. The latter was first included in the table in the latest revision. In all three cases, the maximum authorized punishment depends upon the value involved. Receiving stolen property is a more serious offense than accessory after the fact in violation of article 78. Although a person cannot be convicted of receiving stolen property which he has stolen, he may be convicted of the offense even though he was a statutory principal in the larceny.¹⁸¹ This seems to be anomalous, but the situation has not been clarified by later decisions.

Communicating a threat, a rather common offense within the general article, is punished by 3 years confinement. A threat is an avowed, present determination or intention to injure another presently or in the future.¹⁸² It must be made known to the victim and it must be apparent from its language that the threatened act is wrongful.¹⁸³ The

176. *United States v. Gentle*, 16 U.S.C.M.A. 437, 37 C.M.R. 57 (1966).

177. *United States v. Kirsch*, 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964).

178. Such conduct also is prohibited by 18 U.S.C. § 4 (1964).

179. *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939); *Assey*, 9 C.M.R. 732 (1953).

180. *See Maclin*, 27 C.M.R. 590 (C.M. 400358) (1958), where the value of the goods was pertinent to whether a felony had been committed.

181. *United States v. Ford*, 12 U.S.C.M.A. 3, 30 C.M.R. 3 (1960).

182. *United States v. Jenkins*, 9 U.S.C.M.A. 381, 26 C.M.R. 161 (1958); *United States v. Sturmer*, 1 U.S.C.M.A. 17, 1 C.M.R. 17 (1951). Use of the mails to communicate a threat is violative of 18 U.S.C. § 876 (1964).

183. *United States v. Humphrys*, 7 U.S.C.M.A. 306, 22 C.M.R. 96 (1956); *cf. United States v. Sulima*, 11 U.S.C.M.A. 630, 29 C.M.R. 446 (1960); *United States v. Mawhinney*, 11 U.S.C.M.A. 350, 29 C.M.R. 166 (1960).

communication may be either oral or written,¹⁸⁴ and it may be communicated indirectly to the person threatened.¹⁸⁵ The prospect of actual physical injury is not required; any kind of injury is sufficient, such as an injury to reputation.¹⁸⁶ Nor must there be a present ability to carry out the threat, so long as there is a possibility that it can be carried out in the future.¹⁸⁷ It may also be conditional if there is a possibility that the condition may happen,¹⁸⁸ but it must be more than idle talk or jesting.¹⁸⁹

The various offenses relating to the mail which are violations of the general article—taking, opening, abstracting, secreting, destroying, stealing, or obstructing—involve cases in which the mail is in those “military channels which do not operate under the Post Office Department.”¹⁹⁰ The gravamen of the offense is the interference with the sanctity of the mails.¹⁹¹ It is difficult to imagine an act more likely to be prejudicial to good order and military discipline than interference with the prompt delivery of the mail. Nevertheless, obstruction of the

184. Fishwick, 25 C.M.R. 897 (1958) (dictum).

185. United States v. Gilluly, 13 U.S.C.M.A. 458, 32 C.M.R. 458 (1963); O’Neal, 26 C.M.R. 924, *petition denied*, 10 U.S.C.M.A. 668, 27 C.M.R. 512 (1958). Cf. United States v. Rutherford, 4 U.S.C.M.A. 461, 16 C.M.R. 35 (1954).

186. United States v. Frayer, 11 U.S.C.M.A. 600, 29 C.M.R. 416 (1960) (threat to accuse a person falsely); Day, 4 C.M.R. 278 (1952) (threat to a Japanese girl to close her cabaret). In United States v. Jenkins, 9 U.S.C.M.A. 381, 26 C.M.R. 161 (1958), it was said that an invitation to engage in a fight does not necessarily constitute a threat. In Conway, 33 C.M.R. 903, *petition denied*, 14 U.S.C.M.A. 682, 33 C.M.R. 436 (1963), it was held that a threat to injure the unborn child of a pregnant woman was a threat to the woman herself. In Campion, 20 C.M.R. 537 (1955), it was said that a threat must be directed to another person so does not include a threat of suicide.

187. United States v. Sturmer, 1 U.S.C.M.A. 17, 1 C.M.R. 17 (1951).

188. Douglas, 9 C.M.R. 619 (1953) (dictum).

189. United States v. Humphrys, 7 U.S.C.M.A. 306, 22 C.M.R. 96 (1956). Cf. United States v. Gilluly, 13 U.S.C.M.A. 458, 32 C.M.R. 458 (1963).

190. United States v. Lorenzen, 6 U.S.C.M.A. 512, 515, 20 C.M.R. 228, 231 (1955) (dictum). In United States v. Dicario, 8 U.S.C.M.A. 353, 24 C.M.R. 163 (1957), it was said that the military version of a mail offense is distinct from a violation of 18 U.S.C. § 1702 (1964). Of course, if the mail were still in the custody of the Post Office Department, the same conduct would be chargeable under the third clause of article 134.

191. United States v. Lorenzen, 6 U.S.C.M.A. 512, 20 C.M.R. 228 (1955). In United States v. Ray, 6 U.S.C.M.A. 598, 20 C.M.R. 314 (1956), a conviction of opening and secreting the package of another was reversed because it was not alleged that it was “mail matter.” In United States v. Peoples, 7 U.S.C.M.A. 534, 22 C.M.R. 324 (1957), it was said that matter is in the mail from the time it is deposited in a receptacle for the deposit of mail. In Wygas, 18 C.M.R. 576 (ACM 9578), *petition withdrawn*, 5 U.S.C.M.A. 865, 19 C.M.R. 413 (1955), it was said that decoy letters may be mail matter.

mail requires a specific intent to achieve an unlawful purpose; consequently, mere inability to process the mail expeditiously does not constitute an offense.¹⁹²

The common law crime of solicitation is a violation of the general article,¹⁹³ except for those offenses specifically prohibited by article 82, *i.e.*, solicitation to desert, to mutiny, to misbehave before the enemy, or to commit an act of sedition. The Table of Maximum Punishments provides that the punishment for solicitation is the same as that which would be authorized for commission of the principal offense, but no confinement shall be longer than 5 years.

In addition to those offenses discussed above, and some which have been omitted,¹⁹⁴ there are still many other types of conduct which are not listed in the Table of Maximum Punishments but which are still

192. *United States v. Heagy*, 17 U.S.C.M.A. 492, 38 C.M.R. 290 (1968).

193. *E.g.*, *United States v. Goodnight*, 9 U.S.C.M.A. 542, 26 C.M.R. 322 (1958) (soliciting a subordinate to disobey a regulation prohibiting the seeking of contributions for the benefit of a superior); *United States v. Haveriland*, 8 U.S.C.M.A. 621, 25 C.M.R. 125 (1958) (soliciting another to violate a regulation); *United States v. Walker*, 8 U.S.C.M.A. 38, 23 C.M.R. 262 (1957) (soliciting another to commit sodomy and an indecent act); *United States v. Oakley*, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957) (soliciting another to procure poison to poison a sergeant).

194. The offenses included in the table under the general article in the latest revision, not previously discussed, authorizing confinement are: burning with intent to defraud (although arson long has been a violation of article 126), unlawfully transporting a vehicle or aircraft in interstate or foreign commerce (somewhat an extension of the offense violative of title 18 of the United States Code), and criminal libel.

Offenses authorizing a punitive discharge are: circumstances that would endanger life, and the unauthorized carrying of a concealed weapon. Offenses which may be considered minor, because the maximum confinement authorized is 6 months or less, are: wearing unauthorized insignia, breaking medical quarantine, gambling by a non-commissioned officer with a subordinate, permitting a prisoner to do an unauthorized act, committing a nuisance, straggling, offenses by or against sentinels, and having an unclean uniform or unclean military equipment.

It is provided in the 1969 MANUAL ¶ 127(c)(1) that if an offense is not listed in the table, the maximum punishment for it shall be that provided for the most closely-related offense listed, or the lesser of them if it is closely related to more than one listed offense. It then is provided that if there is no closely related offense listed, the maximum shall be that provided for similar conduct by the United States Code or the Code of the District of Columbia, *Id.*, ¶ 127(c)(1).

This may be rather difficult to explain to the enlisted member of the service, in giving the explanation required by article 137. See note 1 *supra*.

The Court of Military Appeals has, to some extent, limited the application of this provision. In more than one case, it has found that if no other provision was applicable, the maximum punishment should be that provided for a simple disorder. *E.g.*, *United States v. Melville*, 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958); *United States v. Walker*, 8 U.S.C.M.A. 38, 23 C.M.R. 262 (1957); *United States v. Tamas*, 6 U.S.C.M.A. 502, 20 C.M.R. 218 (1955); *United States v. Blue*, 3 U.S.C.M.A. 550, 13 C.M.R. 106 (1953).

prohibited by the general article. A partial list of convictions sustained on review include: obtaining telephone services with an intent to defraud in the placing of a long-distance call,¹⁹⁵ cruelty to members of one's own family,¹⁹⁶ communicating a false, defamatory statement about another person,¹⁹⁷ having a female in military quarters while the accused was on duty,¹⁹⁸ kidnapping,¹⁹⁹ and the unlawful conversion of another's property. The last offense was defined as dealing with the property of another in a manner contrary to the rights of the owner.²⁰⁰

Considerably fewer cases have held that the defendant's conduct did not violate the general article. These include cases of: one who, without authority, removed two fuses from an electric fuse box;²⁰¹ a soldier who took a female to a military reservation and failed to remove her from the post until an early morning hour;²⁰² and a male airman who was found in an enlisted day room for female personnel at an early morning hour.²⁰³

VI. Improper Conduct by Officers

Officers traditionally have been held to a higher standard of conduct than enlisted personnel. Conduct unbecoming an officer and a gentleman is prohibited by article 133 and has been a military offense since the time of the American Revolution. Until 1949, the punishment was mandatory dismissal from the service.²⁰⁴ The offense re-

195. *United States v. Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965).

196. *Francis*, 12 C.M.R. 695, *petition denied*, 3 U.S.C.M.A. 837, 13 C.M.R. 142 (1953).

197. *United States v. Brown*, 12 U.S.C.M.A. 368, 30 C.M.R. 368 (1961), a case which arose before criminal libel was included in the table as an article 134 violation in the 1969 MANUAL.

198. *Cole*, 30 C.M.R. 755 (1961).

199. *United States v. Charlton*, 18 U.S.C.M.A. 141, 39 C.M.R. 141 (1969); *United States v. Jackson*, 17 U.S.C.M.A. 580, 38 C.M.R. 378 (1968).

200. *United States v. Matoka*, 16 U.S.C.M.A. 608, 37 C.M.R. 228 (1967).

201. *Davis*, 27 C.M.R. 908 (1958).

202. *Hibbard*, 12 C.M.R. 492 (1953).

203. *Smart*, 12 C.M.R. 826 (1953). This decision turned on the fact that there was no long-standing custom of the service which would prohibit such conduct.

204. The British Articles of War of 1765 provided discharge from the service for behaving in a scandalous, infamous manner such as is unbecoming the character of an officer and a gentleman, and this language was used in the Articles of War adopted by the American Colonies in 1775 and revised in 1776. The following language was used in the revision of 1806: "Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed from the service." Act of Apr. 10, 1806, ch. 20, 2 Stat. 369. The same language was used in article 61 adopted in 1916, but with cadets included along with officers. Act of Aug. 29, 1916, ch. 418, § 3, art. 95, 39 Stat. 666.

mained serious after the 1951 amendments to the code. The code provides that "conduct unbecoming an officer and a gentleman shall be punished as a court-martial shall direct."²⁰⁵

The great similarity between this article and the general article has not gone unnoticed. The Court of Military Appeals has said it "may be that a different standard applies if an officer is charged under Article 133" than in the case of an allegation against either an officer or an enlisted person under article 134. The court, however, had "some misgivings about a principle which stamps an act criminal if committed by an officer but innocent when perpetrated by an enlisted man."²⁰⁶

Nonetheless, it still appears that an officer convicted of a violation of article 134 may be sentenced to dismissal from the service when for the same conduct a punitive discharge would not be authorized for his enlisted counterpart. The court approved the provision of the *Manual for Courts-Martial*²⁰⁷ which authorizes dismissal from the service as punishment for any violation of military law by an officer.²⁰⁸

A type of conduct by an officer which may be prejudicial to good order and military discipline under article 134 is social fraternization with enlisted personnel under circumstances that are condemned by the customs of the service. In one case the court said:

By long-standing custom of the service, an officer should not drink intoxicating liquor with enlisted men or wrongfully fraternize with them to the extent that the familiarity so induced will affect or prejudice good order or military discipline. The basis for the custom is the preservation of military discipline and is not a question of social inequality²⁰⁹

In one case an officer took an enlisted man to bachelor quarters, offered him intoxicating liquor, and invited him to remain overnight as a guest. A conviction under article 134 was sustained, but in doing so

205. The provision for mandatory dismissal from the service upon conviction of conduct unbecoming an officer and a gentleman was removed by an amendment on the floor of the House of Representatives, without discussion, after committees of both houses had reported the bill to amend the Articles of War with mandatory dismissal included. S. Res. 4080, 81st Cong., 1st Sess., 95 CONG. REC. 5743 (1949).

206. *United States v. Claypool*, 10 U.S.C.M.A. 302, 304, 27 C.M.R. 376, 378 (1959). Cf. *United States v. Daggett*, 11 U.S.C.M.A. 681, 29 C.M.R. 497 (1960), in which the court said that a false statement during an investigation can be a violation of article 133 even though an intent to deceive and officiality are not alleged as would be required for a conviction under article 107.

207. 1969 MANUAL ¶ 126(d).

208. *United States v. Goodwin*, 5 U.S.C.M.A. 647, 18 C.M.R. 271 (1955).

209. *Livingston*, 8 C.M.R. 206, 210 (1952), *petition denied*, 2 U.S.C.M.A. 676, 8 C.M.R. 178 (1953).

the court gave many examples of acceptable situations involving associations between officer and enlisted personnel. Each situation must be considered in the light of whether a reasonably prudent person, experienced in the problems of military leadership, would conclude that good order and discipline would be prejudiced.²¹⁰

The accused's status as an officer was an aggravating circumstance in several cases under article 134, *e.g.*, the case of an officer who was found in a compromising situation with the wife of an enlisted man,²¹¹ an officer who solicited an enlisted man to go absent without leave,²¹² and the exhibition of obscene and lewd motion pictures to military personnel.²¹³

VII. Some Observations

Critics of the general article have generally complained about its uncertainty. It cannot be denied that uncertainty exists even though there are thousands of cases interpreting the article. Several years after the Uniform Code became effective, a survey revealed that almost one-third of the reported cases involved at least one offense charged under the general article, although in most cases the accused were charged with other misconduct in addition to the article 134 violation.

Presently, there are fifty-five offenses listed in the Table of Maximum Punishments as violations of the general article, disregarding those which are subdivided to provide greater punishment for aggravating circumstances. A punitive discharge is an authorized punishment for more than 60 percent of these offenses and long prison sentences are frequently authorized. For example, confinement for up to 20 years is authorized for assault with intent to commit murder or rape; 10 years is authorized for various other serious offenses, including burning with intent to defraud and a number of drug offenses.

With the exception of the obvious clarification that would result if the Table of Maximum Punishments were to list all forms of assault under article 128, it is doubtful that the general article could be made more certain without amending legislation. Nevertheless, this would seem to be a worthy long-term goal of both the Congress and the Department of Defense. Amending legislation would probably add at least thirty punitive articles to the more than fifty presently in the Uniform

210. Free, 14 C.M.R. 466 (1953).

211. Lee, 4 C.M.R. 185, *petition denied*, 1 U.S.C.M.A. 712, 4 C.M.R. 173 (1952).

212. Jackson, 8 C.M.R. 215 (1952), *petition denied*, 2 U.S.C.M.A. 677, 8 C.M.R. 178 (1953).

213. Cowan, 12 C.M.R. 374 (1953); *see* United States v. Jewson, 1 U.S.C.M.A. 652, 5 C.M.R. 80 (1952).

Code. This would not be an unreasonable proliferation.

The more serious misconduct for which a punitive discharge is an authorized punishment should be included in one or more specific punitive articles. This is certainly preferable to relying on punishing such conduct only if it is prejudicial to discipline or discreditable to the service.

A court-martial must be instructed that an element of an offense charged under article 134, other than a crime or offense not capital, is prejudicial to military discipline or of a nature to bring discredit upon the Armed Forces.²¹⁴ Appellate military tribunals have, upon occasion, found that conduct which resulted in convictions was not prejudicial to discipline or discreditable to the service, and have held that no offense was committed.²¹⁵ Yet there is no requirement that there be testimony of one versed in military matters that, in his opinion, the conduct charged was either prejudicial to discipline or discreditable to the service. Perhaps some convictions would not have been reversed if there had been such testimony.

The third clause should certainly be enacted into a separate article. "Crimes and offenses not capital" has a very definite meaning, and it should not be confused with the first two clauses. Rather than using the traditional wording, however, it would be better simply to provide that any act or omission which is not punishable under another article of the Uniform Code, but which is denounced as a crime or offense by the Congress or under the authority of the Congress, may be tried by court-martial. This is a paraphrase of the language in which the *Manual for Courts-Martial* explains the clause.²¹⁶

Conclusion

From a realistic viewpoint it is unlikely that early action can be expected with respect to the suggested changes included in this discussion. The legislative process is slow. Several years were required to draft and to enact the Uniform Code of Military Justice, and subsequent amendments have required more than a year, sometimes several years, to be passed.

As a personal observation, in reviewing many thousands of cases involving article 134 and its predecessors, not a single instance has

214. *United States v. Darby*, 9 U.S.C.M.A. 416, 26 C.M.R. 196 (1958). See cases cited note 33 *supra*.

215. See notes 186-88 *supra*.

216. 1969 MANUAL ¶ 213(e).

been found in which it could be concluded that no one could reasonably believe that the conduct charged was not in some way prejudicial to discipline or discreditable to the service. This is not meant as a criticism of the tribunals which have reversed convictions under the general article. Many of the convictions were reversed either for technical reasons or because it was held that the conduct did not reach the degree of wrongfulness that should result in a conviction. It is a tribute to those who have administered military justice through the years that there has been no great clamor to remove the vagueness discussed above.

